

IS SHARING CARING? 'ENERGY SHARING' WITHIN ENERGY COMMUNITIES UNDER EU LAW

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Abstract

The term 'energy sharing' was introduced for the first time in EU energy legislation under the Clean Energy for All Europeans package. In particular, energy communities need to be allowed to share energy within the community. While it seems that the term has been deliberately introduced as a new activity, the directives provide little guidance about what it exactly entails. On the basis of a brief literature review on the concept 'sharing' and the overall framework and objectives of the directives, this contribution explores what energy sharing could mean and whether and how it could include a 'caring' component for an inclusive energy transition.

1 Introduction

As part of the EU legal framework on 'citizen energy communities' (CEC) and 'renewable energy communities' (REC) the EU Member States have to ensure that, among other activ-

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ities, energy communities can ‘share’ energy within the community.² The term ‘sharing’ is, however, not further defined or explained in the directives, which raises the question how ‘sharing energy’ can be legally implemented, especially vis-à-vis the rights and responsibilities concerning the supply of energy. ‘Sharing is caring’ is a widely known saying and assumption, meaning that we share because we care about each other’s well-being. When we embarked our careers in the field of energy law as students of the LL.M. ‘European law with a specialisation in energy law’ in 2012, Martha Roggenkamp shared her knowledge with us and as we continued our path in academia, she continued sharing her experience and advice. This contribution explores the concept of ‘energy sharing’ in the context of EU energy law and discusses the question whether ‘sharing energy within energy communities’ entails a ‘caring’ component and whether this should become a new activity in the energy sector.

2 New roles for energy consumers under the ‘Clean Energy for All Europeans’ package

One of the aims of the 2019 reform of the EU legal framework of the electricity sector is to place the consumer yet again central.³ As all energy (electricity and gas) consumers can already freely choose their supplier since July 2007,⁴ the aim to further place consumers central in the electricity sector requires their ‘activation’ beyond the choice of supplier. However, in addition to the preceding gradual empowerment of consumers in the market, this time the driving rationale was not only liberalisation of the sector, but also the energy transition.⁵ As the energy transition is not only a transition of fuel sources, from fossil to renewable, but also a transition of organisational structures of the sector, where the classical ‘top-down’ supply chain setting is supplemented with a ‘bot-

2 Art. 16(3 e) Directive (EU) 2019/944/ of 5 June 2019 concerning common rules for the internal market for electricity [2019] OJ L158/125 (hereinafter ‘Electricity Directive’), art. 22(2 b) Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources [2018] OJ L328/82 (hereinafter ‘Renewable Directive’).

3 Commission of the EU, DG Energy (2019) *Clean Energy for All Europeans*, 26 July 2019.

4 Art. 21(1) Directive 2003/54/EC concerning common rules for the internal market in electricity [2003] OJ L 176/ 37; Art. 23(1) Directive 2003/55/EC concerning common rules for the internal market in natural gas [2003] OJ L 176/ 57.

5 Martha M Roggenkamp and Lea Diestelmeier, ‘Energy Market Reforms in the EU: A New Focus on Energy Consumers, Energy Poverty and Energy (in)Justice?’ in I. Del Guayo, L. Godden, D. D. Zillman, M. F. Montoya, & J. J. González (eds.) *Energy Justice and Energy Law – Distributive, Procedural, Restorative and Social Justice in Energy Law* (Oxford University Press 2020).

tom-up' organisation, new legal concepts and actors were introduced. Most prominently, the Electricity Directive, introduced a new category of consumers, namely 'active customers' who are not only consuming, but also producing, selling, storing or participating in energy efficiency or flexibility schemes, as long as those activities do not constitute their main commercial or professional activity.⁶

Another new actor which was introduced in two directives are 'energy communities'. Notably, the Renewable Directive and the Electricity Directive respectively introduced REC and CEC. While there are some differences, the two definitions are largely overlapping and contain the following main elements:⁷ (i) the energy community has to be established by a dedicated legal entity in which participation is 'based on voluntary and open participation and is effectively controlled by members or shareholders that are natural persons, local authorities, including municipalities, or small enterprises' (for REC, medium enterprises may be included too, but members and shareholders need to be located in 'proximity of the renewable energy project' building in an element of 'localness');⁸ (ii) The purpose of such a community is to generate 'environmental, economic or social community benefits to its members or shareholders [...] rather than to generate financial profits';⁹ (iii) The activities that energy communities may carry out include at least production, consumption, storage and selling of energy and are extended for CEC by distribution, supply, 'aggregation', provision of energy efficiency services, charging services for electric vehicles, or 'other energy services', to its members or shareholders.¹⁰ In this context, 'aggregation' means to combine various production and consumption patterns of multiple users/community members.¹¹ In addition to this broad range of activities, Member States need to ensure that energy communities can 'share energy within the community' which was produced by production units owned by the energy community.¹² What exactly the activity of sharing entails, however, is left unanswered by the directives. As the legal form of energy communities is not specified beyond the requirement that a dedicated legal entity needs to be established and the range of activities is large and seems non-exhaustive, the most important distinctive element of energy communities vis-à-vis 'conventional' companies in the sector seems to be the require-

6 Art. 2(8) Electricity Directive.

7 Mikolaj Jasiak, 'Energy Communities: Challenges for the Implementation of the EU Framework' in Martha M Roggenkamp and C. Banet (eds) *European Energy Law Report XIV* (Intersentia, 2021), 197-2018.

8 Art. 2(11 a) Electricity Directive and art. 2(16 a) Renewable Directive.

9 Art. 2(11 b) Electricity Directive and art. 2(16 c) Renewable Directive.

10 Art. 22(2 a) Renewable Directive and art. 2(11 c) Electricity Directive.

11 Art. 2(18 and 11) Electricity Directive.

12 Art. 16(3 e) Electricity Directive, art. 22(2 b) Renewable Directive.

ment to provide ‘environmental, economic, or social community benefits.’¹³ As this appears as a central element for energy communities, it needs to be considered when defining the activities of energy communities, including ‘sharing of energy within the community’. The following section will explore the concept of sharing more generally, before turning to the application to energy communities in particular.

3 Sharing

Even though we all know the term ‘sharing’ and we all apply plenty of sharing practices in everyday life, it is yet complex to capture the concept in one universally valid definition, or even legal understanding.¹⁴ For example, sharing could mean to take part in something together, to divide something between two or more people, to give something you have to someone else, or to allow someone else to use something of yours. Sharing can also refer to having similar feelings, ideas, or experiences, or to have equal part or responsibility in something, for example an enterprise, activity, or to, as the authors of this contribution, sharing an office at a law faculty.¹⁵ The practice of sharing is probably as old as humankind, but in recent decades the concept revived with the idea of using existing resources, which are partly left idle, more efficiently in conjunction with the maturing of new technologies, i.e. the internet and (social) digital platforms, which allow extending the circle of the sharing peer community beyond the trusted personal social network.¹⁶ In this context, the term ‘sharing economy’ emerged, which can by and large be understood as ‘consumers granting each other temporary access to under-utilised

13 Lea Diestelmeier, ‘The Role of Energy Communities in Facilitating Sustainable Energy Democracy: Legal Challenges’ in R. Fleming, K. Huhta and L. Reins (eds) *Sustainable Energy Democracy and the Law* (Brill ‘Legal Aspects of Sustainable Development’ 2021) 124-143.

14 Yochai Benkler, ‘Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production’ (2004) 114(2) *The Yale Law Journal* 273-358.

15 See the online ‘Oxford Learners Dictionaries’, from which the definitions of the word ‘Share’ have been used. <<https://www.oxfordlearnersdictionaries.com/definition/english/share>> (last accessed 18-11-2021).

16 Koen Frenken and Juliet Schor, ‘Putting the Sharing Economy into Perspective’ in Oksana Mont (ed.) *A research Agenda for Sustainable Consumption Governance* (Edward Elgar Publishing 2019) 121-135.

physical assets ('idle capacity'), possibly for money.¹⁷ Another understanding adds further attributes, by defining 'sharing economy' as facilitating 'community ownership, localized production, sharing, cooperation, small-scale enterprise, and the regeneration of economic and natural abundance.'¹⁸ Critique levelled against the concept of the sharing economy argues that it narrowly focuses on 'economic transactions of a sharing 'on-demand' economy' while sharing practices entail more and can better be described as '[...] social networks between diverse stakeholders whose main goal is to co-produce, manage, and share, resources, time, services, knowledge, information, and support based on solidarity and reciprocity rather than economic profit.'¹⁹ Accordingly, the goal would be to improve sustainability, innovation, and social interactions by using regional resources for daily needs.²⁰ 'Sharing culture' is the term describing this extended view on sharing practices.²¹

This very brief overview of terminology and concepts related to sharing and new forms to organise sharing shows that implementing the provisions of the EU directives on 'sharing energy within energy communities' is anything but straightforward. Expectedly, it becomes even more complex when taking into account the physical peculiarities of the energy sector and the individual dependence on reliable and stable access to the resource. The following section focuses on this matter.

4 Sharing energy within energy communities: What could it mean?

Both directives identically mention that Member States have to

17 Koen Frenken et al. (20 May 2015) 'Smarter Regulation for the Sharing Economy' The Guardian <<https://www.theguardian.com/science/political-science/2015/may/20/smarter-regulation-for-the-sharing-economy> (last accessed 21-11-2021). This definition is close to the one provided by the Oxford dictionary which reads as follows: 'An economic system in which assets or services are shared between private individuals, either free or for a fee, typically by means of the internet.'

18 Janelle Orsi, 'Practicing Law in the Sharing Economy: Helping People Build Cooperatives, Social Enterprise, and Local Sustainable Economies' (2013) American Bar Association.

19 Eleni Katrini, 'Sharing Culture: On Definitions, Values, and Emergence' (2018) 66(2) The Sociological Review 425–446, 426.

20 Eleni Katrini, 'Sharing Culture: On Definitions, Values, and Emergence' (2018) 66(2) The Sociological Review 425–446, 426.

21 Ann Light and Clodagh Miskelly, 'Sharing Economy vs Sharing Cultures? Designing for Social, Economic and Environmental Good' (2015) 24 Interaction Design and Architecture(s) 49–62.

‘[...] ensure that [renewable/citizen] energy communities are entitled to arrange within the [renewable/citizen] energy community the sharing of [renewable energy/electricity] that is produced by the production units owned by the community, subject to other requirements laid down in this Article and subject to the community members retaining their rights and obligations as final customers.’²²

While this provision (nor any other paragraph of that article) further elucidates on what sharing exactly means, it is clearly stated that it cannot alter rights and obligations of final customers and thus implies what sharing cannot be. A popular common assumption is that energy can be shared in the sense of ‘peer-to-peer-supply’, meaning that the members of the community (the peers) supplement each other in supply and jointly suffice the demand of the community. This would, however, only be in so far possible as it would not negatively affect the rights of consumers, in particular, the right of household customers (and potentially small and medium-sized enterprises, *SMES*) to ‘enjoy universal service, namely the right to be supplied with electricity of a specified quality within their territory at competitive, easily and clearly comparable, transparent and non-discriminatory prices’,²³ where supply means ‘the sale, including the resale, of electricity to customers.’²⁴ Sharing can thus not be an alternative to ‘supply’ of energy, at least not for small customers (households and *SMES*). Nevertheless, potentially, ‘sharing energy’ might complement the regular supply of energy.

What else could energy sharing then mean? Considering the central requirement of energy communities to contribute to ‘environmental, economic, or social community benefits rather than financial profits’, sharing might be closer to the concept of ‘sharing culture’ than ‘sharing economy’ and the ‘on-demand economy’ as outlined in section 3 above. This could include, for example, taking part in something together, dividing something among a group, having similar ideas, or to have an equal part or responsibility in a legal entity or an activity. However, the legal text of the provision seems to suggest that it is not the production activity which is subject to sharing, as the focus seems to be on the resource ‘renewable energy/electricity’ that is shared. It might then simply mean that energy which has been produced by installations owned by the community is accounted to its members according to specified criteria. Considering the ‘community benefit’ purpose that energy communities have to fulfil, these criteria could yield different goals and can be defined for example, according to the contribution of the member, ‘all get the same’ on the basis of solidarity, or according to other principles, such as the

22 Art. 16(3 e) Electricity Directive, art. 22(2 b) Renewable Directive.

23 Art. 27(1) Electricity Directive.

24 Art. 2(12) Electricity Directive.

share of income spent on energy, in order to support 'energy poor' or 'vulnerable customers'.²⁵ Following on the latter criteria which involve a more social aim seems to be in line with the overall idea of the directives to facilitate an 'inclusive energy transition'. This is for example established in recital 43 of the Electricity Directive and recitals 67 and 71 of the Renewable Directive which stipulate that community energy:

- offers an inclusive option for all consumers to have a direct stake in producing, consuming or sharing energy.
- initiatives focus primarily on providing affordable energy for their members or shareholders rather than on prioritizing profit-making.
- can also advance energy efficiency at household level and help fight energy poverty through reduced consumption and lower supply tariffs.
- enables certain groups of household customers to participate in the electricity markets, who otherwise might not have been able to do so (specifically referring to vulnerable customers and tenants).

Interpreting the term 'sharing energy' following this line, would do justice to the saying mentioned in the title and the introduction that sharing entails a 'caring element'. Nevertheless, this would also strictly imply that other rights and obligations assigned to customers have to be respected and cannot be hampered by the activity of sharing.

5 Conclusion

The term 'sharing' has been introduced for the first time by the Electricity Directive and the Renewable Directive adopted under the 'Clean Energy for All Europeans' package. It seems that the term has been deliberately chosen as opposed to 'supply'. Yet, the directives provide only little guidance of what this term exactly implies. While 'sharing' is indeed a common term, it is a complex term from a legal perspective in general and in particular in the energy sector where many actors have rights and obligations which cannot be hampered by the activity of sharing, whatever it exactly implies. Our brief analysis of the term showed that on a conceptual level, the understanding of 'sharing' is discussed and can either be interpreted in line with economic goals ('sharing economy')

²⁵ The concepts 'vulnerable customer' and 'energy poverty' are not defined by EU law. However, the Electricity Directive does require Member States to ensure the adequate protection of vulnerable customers, *inter alia* the prohibition of disconnection. The concepts are interlinked, as the definition of vulnerable customers may relate to energy poverty. 'Energy poverty' is also not defined, but the Electricity Directive does suggest some criteria, including low income, high expenditure of disposable income on energy and poor energy efficiency. See art. 28 and 29 Electricity Directive.

or wider, as something that complements the conventional economic system ('sharing culture'). As the overall aim of energy communities needs to be to provide 'community benefits rather than financial profits', the former understanding applying the idea of the 'sharing economy' might be too limited. Furthermore, considering the wider context provided in the directives seems to suggest that energy communities should fulfil societal and even social goals which could potentially be implemented via the activity of 'sharing' in form of accounting energy that has been produced by a production installation owned by the community according to criteria incorporating a common social value. In 2022, it has been 10 years since the authors have embarked on the topic of energy law, it seems that since then the field has only expanded and many more questions are emerging. We hope that Martha Roggenkamp will continue sharing knowledge and experiences in the future, both in conversations with us and with the (academic) world.